

Filed for intro on 02/02/95
House Bill _____
By _____

Senate Bill No.SB0406
By Cohen

AN ACT to amend Tennessee Code Annotated, Title 29, to provide a separate cause of action for sexual misconduct by a therapist.

WHEREAS the General Assembly deplores the exploitation and abuse of persons who entrust their emotional or mental well-being to professionals who hold themselves out to be able to assist them in their time of distress; and

WHEREAS sexual relations between a therapist and any patient is considered unprofessional conduct which has detrimental effects for the patient; and

WHEREAS Tennessee Code Annotated, Title 29, Chapter 26, fails to adequately provide recourse for those harmed by the unprofessional conduct of their therapist; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The title of this act is, and may be cited as, the "Therapist Sexual Misconduct Victims Compensation Act".

SECTION 2. It is the intention of the general assembly to provide victims of sexual misconduct by a therapist with a legal remedy, including significant compensatory damages and

a more reasonable statute of limitations. It is intended to prevent sexual misconduct by therapists by imposing significant liability upon any therapist who engages in this type of misconduct. This is necessary due to the inadequacy of the current system of malpractice where the statute of limitations fails to address the specific problems associated with sexual misconduct by therapists. The act also clarifies the legal landscape and attempts to prevent most instances of sexual misconduct by making employers liable if they refuse to take simple and reasonable steps to avoid endangering their patients.

SECTION 3. As used in this act, unless the context otherwise requires:

(1) "Claimant" means any of the following;

(A) the victim;

(B) the parents of the victim where the victim is still a minor;

(C) the legal guardian of the victim if the victim is not competent to assert his or her legal rights; or

(D) the spouse of the victim where the sexual misconduct occurred while the spouse and the victim were married.

(2) "Deception" means the representation that sexual actions are part of or consistent with the patient's treatment by the therapist.

(3) "Emotionally dependent" means that the patient's emotional condition is such that the therapist knows or has reason to know that the patient is not competent to give consent to sexual advances due to the relationship which the therapist and patient have developed in the course of treatment by the therapist.

(4) "Employer" means any person or entity that employs any therapist for the purpose of providing therapy.

(5) "Patient" means a person who has obtained therapy from a therapist. For purposes of this act, patient encompasses both current and former patients of a therapist.

(6) "Sexual behavior" means sexual activity of the victim other than the sexual act(s) at issue in the case.

(7) "Sexual misconduct" means any of the following, regardless of the consent of the patient:

(A)(i) any intrusion into an opening of the patient's body by any part of the therapist's body, or an object used by the therapist to effect an intrusion for the purpose of sexual arousal or gratification;

(ii) any intrusion into an opening of the therapist's body by any part of the patient's body, or an object used by the patient to effect an intrusion for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence;

(iii) touching of the patient's body by the therapist for the purpose of sexual arousal or gratification; or

(iv) touching of the therapist's body by the patient for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence.

(B) Sexual misconduct includes attempts by the therapist to engage in the conduct described in (A)(i) through (iv), inclusive, of this item.

(C) Conduct which is part of standard medical treatment shall not constitute sexual misconduct if the therapist is legally permitted and qualified to perform such medical treatment.

(8) "Therapist" means any person who performs therapy regardless of whether the person is licensed by the state.

(9) "Therapy" means the professional treatment, assessment, or counseling of a mental or emotional disorder, illness, condition or symptom. It includes but is not limited to marital counseling, substance abuse treatment, and family counseling. Therapy

begins the first time the patient seeks the therapist's assistance as a therapist. This definition includes services provided without charge if they otherwise meet the definition.

SECTION 4. A cause of action for sexual misconduct exists for a claimant where the sexual misconduct occurred:

- (a) during the time when the patient was receiving therapy from the therapist; or
- (b) after the patient has stopped receiving therapy from the therapist if, (1) the patient is still emotionally dependent upon the therapist, or (2) the sexual misconduct was the result of deception; or
- (c) both (a) and (b).

SECTION 5. A therapist does not violate Section 4 if the patient is:

- (a) the spouse of the therapist and was married to the therapist prior to the establishment of the therapist-patient relationship, or
- (b) the sexual relationship began prior to the establishment of the therapist-patient relationship.

SECTION 6. (a) An employer of a therapist may be liable under Section 4 if sexual misconduct occurred as provided in Section 4, and either of the following applies:

- (1) the employer fails to take reasonable action when the employer knows or has reason to know that the therapist has engaged in sexual misconduct with any patient; or

- (2) the employer fails to make inquiries of a former employer concerning past sexual misconduct of the therapist where (A) the former employer's name and address has been disclosed to the employer; and (B) the therapist was employed by the former employer as a therapist within five (5) years of the date of employment as a therapist for the employer.

(b) An employer or former employer of a therapist may be liable under Section 4 if:

(1) sexual misconduct occurred as provided in Section 4;

(2) the employer or former employer receives a written request from another employer or prospective employer concerning sexual misconduct by the therapist;

(3) the employer or prospective employer is considering the therapist for a therapist position; and

(4) the employer or former employer fails or refuses to disclose to the requesting employer the occurrence of sexual misconduct by the therapist.

(c) An employer or former employer who gives information concerning sexual misconduct by a therapist when presented with a request for such information by a prospective employer of the therapist is absolved from any legal liability due to the therapist's failure to find employment or damage to the therapist's reputation as a result of the information provided, unless the information is false and the reporting employer knew or should have known that the information was false.

(d) Nothing in this section is intended to affect in any way the application of employer liability if such liability rests upon negligence by the employer in supervising the therapist or where the scope of employment would encompass the sexual misconduct.

SECTION 7. In an action for sexual misconduct, the victim's sexual history is not admissible as evidence except to prove that the sexual behavior occurred with the therapist prior to the provision of therapy to the patient by the therapist. During discovery, only evidence which is relevant to a determination of the timing of the sexual relationship between the parties is discoverable.

SECTION 8. (a) The statute of limitations in sexual misconduct actions shall be two (2) years from the date the alleged injury is discovered. For purposes of this section, discovery of the alleged injury occurs after therapy ends and it is established by a preponderance of the

evidence that the victim is no longer emotionally dependent upon the therapist, and the patient knew or should have known that sex with a therapist is unprofessional and harmful to the patient.

(b) Except as provided in (c) of this section, no such action shall be brought more than ten (10) years after the date on which the sexual misconduct occurred.

(c) Where the sexual misconduct involves a minor the statute of limitations shall be one (1) year after the minor's eighteenth (18th) birthday, except that where (a) or (b) above would provide for a longer time in which to bring a claim, the provision that provides the longest time in which to bring a claim shall apply.

SECTION 9. The claimant may recover for damages caused by the sexual misconduct. Such damages include but are not limited to:

(a) reasonable economic losses caused by the emotional, mental or physical effects of the sexual misconduct, including but not limited to:

(1) the cost of counseling, hospitalization and any other expenses connected with treating the harm caused by the sexual misconduct;

(2) any payments made to the therapist for treatment;

(3) the cost of counseling, hospitalization and any other expenses connected with treating the mental disorder, illness, condition, or symptom for which the patient had sought therapy from the therapist; and

(4) loss of income caused by the sexual misconduct;

(b) pain and suffering caused by the sexual misconduct, including but not limited to psychological and emotional anguish; and

(c) if the victim is dead, the claimant may seek damages for wrongful death where the victim's death is the result of the physical or emotional harm inflicted upon the victim by the sexual misconduct of the therapist.

SECTION 10. The provisions of this act are declared to be remedial in nature and the provisions of this act shall be liberally construed to effectuate its purposes.

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect upon becoming law, the public welfare requiring it.